No. 92-104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH F. ADA, GOVERNOR OF GUAM,
in his official capacity,
Petitioner,

v.

GUAM SOCIETY OF OBSTETRICIANS & GYNECOLOGISTS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents brought this declaratory judgment action on the broadest of grounds—claiming that Guam P.L. 20-134 is unconstitutional on its face and seeking a permanent injunction against its enforcement in all of its applications. The lower courts granted Respondents the relief requested, declaring the law facially invalid and permanently enjoining its enforcement in all circumstances.

Petitioner has asked this Court to determine whether the grant of that relief was proper. As stated, the Question Presented requests this Court to make at least one, and possibly two, determinations. First, is the Guam law unconstitutional in *all* of its applications? If the answer to this question is in the affirmative, then the Court need go no further because the relief sought and obtained by Respondents clearly would have been proper. If the answer is in the negative, however, the Court must address a second question: May enforcement of a law which has *some* constitutional applications be permanently enjoined in its entirety?

Petitioner submits that under this Court's facial challenge rules, the Guam law may not be declared unconstitutional in its entirety or enjoined in all of its possible applications if it is constitutional in *some* of those applications. *See* Petition at 8. The Petition, relying upon this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), argues that the law is constitutional in at least some of its applications. *See Petition* at 8-15. Accordingly, the Ninth Circuit's decision, which holds the Guam law facially invalid and enjoins its enforcement in all circumstances, conflicts with the applicable decisions of this Court.

In their Brief in Opposition, Respondents argue that the Petition should be denied for three reasons. First,

they contend that the Question Presented already was decided in *Roe*, *Doe* and *Casey*. Next, they claim that the Petition seeks an advisory opinion, and thus the Court lacks Article III jurisdiction over this case. Finally, they assert that the Petition impermissibly seeks to have this Court redraft the Guam law. Each of these arguments is based upon a serious mischaracterization of Petitioner's arguments and upon a fundamental misunderstanding of the applicable law, or a failure even to address it. As set forth below, the reasons for denying the Petition are meritless and the reasons for granting the Petition remain substantial. Thus, the Petition should be granted.

I. TO THE EXTENT THAT THE QUESTION PRESENTED ALREADY HAS BEEN DECIDED IN *ROE*, *DOE* AND *CASEY*, IT HAS BEEN DECIDED IN A MANNER THAT CONFLICTS WITH THE NINTH CIRCUIT'S DECISION.

Respondents contend that review should be denied because "this Court [has] settled precisely the question at issue here." Brief in Opposition (Br. Opp.) at 5. They claim that this is so because "this Court reaffirmed [in *Casey*] that a ban on *all* abortions, both before and after viability, such as Guam's, is unconstitutional." *Id.* (emphasis supplied). But the Question Presented for Review in the Petition is *not* whether the Guam law is constitutional in *all* of its applications—the question which *Casey*, *Roe* and *Doe* have answered in the negative. Rather, the Question Presented is whether the law is constitutional in *some* of its applications, and if so, whether it may be constitutionally applied in those instances.

A. The Guam Law Has Some Constitutional Applications.

Petitioner submits that the Guam law must have *some* constitutional applications, unless a woman has an absolute right to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. But *Roe*, *Doe* and *Casey* have rejected the notion that a woman has a right to obtain an abortion for any reason whatsoever throughout the full nine months of pregnancy. *See* Petition at 8-11. Thus, to the extent that *Roe*, *Doe* and *Casey* settled the first part of the Question Presented, they did so in a manner that is consistent with Petitioner's position and that conflicts with the Ninth Circuit's decision.

In support of his argument that the Guam law has some constitutional applications before and after viability, Petitioner suggested some specific examples of abortions that constitutionally may be prohibited, including abortions performed for sex-selection, fetal organ transplant and those performed after viability which are not necessary to preserve the mother's physical health. *See* Petition at 9-14. Respondents apparently believe that abortions for these reasons may not be prohibited. Instead, they argue that a woman has an absolute right to obtain an abortion prior to viability and, thereafter, for broad reasons and without regulation. Br. Opp. at 5 (*quoting Casey*, 112 S.Ct. at 2821); *id.* at 8 n.9, 14 n.14.[1] In making that argument, Respondents quote selectively from *Casey* and disregard other statements in *Casey*, *Roe* and *Doe* which appear to contradict the arguably all-encompassing language upon which they rely. *See* Petition at 7, 10-11. To the extent that there is some doubt regarding the constitutionality of the statute as it pertains to the specific applications suggested to be constitutional by Petitioner, the Question Presented has not yet been answered by this Court. In either case—whether because the Ninth Circuit's decision is in conflict with

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[1] This Court has never expressly held that a concurring physician requirement would be unconstitutional even after viability where the State has a compelling interest in protecting prenatal life. *Doe*, itself, dealt with first trimester abortions. Moreover, in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 419 (1983), Justice O'Connor noted that the *Doe* Court's striking down of a similar provision was the only case in which this Court had held unconstitutional a provision that was *not* an "undue burden." *Id.* at 464 n.9. Given the adoption of the "undue burden" test by the Joint Opinion in *Casey*, it is not at all clear that such a provision is unconstitutional.

this Court's prior decisions or because the question is still left unresolved—the Petition should be granted.

B. Enforcement of the Guam Law May Not Be Permanently Enjoined In All of Its Applications.

1. In bringing this action for declaratory and injunctive relief, Respondents attacked the Guam law on its face.[2] This Court has often stated:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.

Webster v. Reproductive Health Services, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). *See* Petition at 8. With the exception of cases implicating First Amendment rights,[3]

[2] Contrary to their assertions, Br. Opp. at 2-3, 9 n.11, Respondents did not bring an "as-applied" challenge to this law, claiming that the law is unconstitutional insofar as it applies to any particular woman (or class of women) in any given set of circumstances. Nor did they seek any "as-applied" relief as an alternative to their request for a declaration that the law is unconstitutional on its face. *See Renne v. Geary*, 111 S.Ct. 2331, 2340 (1991). Indeed, their brief in the Ninth Circuit referred to the complaint (later dismissed) charging Janet Benshoof under the solicitation provision as "the *one* instance in which the Act was applied." Plaintiffs' Br. at 41 n.65 (emphasis supplied). The solicitation provisions of the law were not appealed and are not before this Court. Moreover, it is clear that the lower courts treated Respondents' challenge as a facial challenge—declaring the law unconstitutional in its entirety and enjoining its enforcement in all applications.

[3] The Court has recognized an "overbreadth" claim only "in the limited context of the First Amendment." *Salerno*, 481 U.S. at 745. In such cases, a statute which has some constitutional applications but reaches a substantial amount of constitutionally protected speech may be declared unconstitutional on its face. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982). No First Amendment claims remain in this appeal. *See* Petition at 5. Thus, the strict *Salerno* test should apply.

a facial challenge should be rejected so long as the statute has *some* constitutional applications.[4] Thus, even if the Guam law cannot be constitutionally applied in many of its applications, it should not have been declared unconstitutional *in toto* and enjoined in all of its possible applications.

The Court's decision in *Connecticut v. Menillo*, 423 U.S. 9 (1975), is particularly instructive on this point. The Connecticut statute at issue prohibited "any person" from performing an abortion that was not "necessary to preserve [the pregnant woman's life] or that of her unborn child." *Id.* at 9. Patrick Menillo, a non-physician, was convicted of attempting to perform an abortion in violation of this statute. The Connecticut Supreme Court vacated his conviction because it thought the state abortion law, which did not distinguish between physicians and non-physicians, was "null and void" under this Court's decisions in *Roe* and *Doe* and, therefore, incapable of constitutional application. *Id.* Thus, the law could not be enforced against the performance of any abortions, including those by non-physicians, and defendant's conviction could not stand.[5] This Court vacated the Connec-

[4] "To sustain [the constitutionality of the procedures of the Bail Reform Act] against such a challenge, we need only find them 'adequate to authorize the pretrial detention of *at least some* [persons] charged with crimes,' . . . ." *Salerno*, 481 U.S. at 751, (*quoting Schall v. Martin*, 467 U.S. 253, 264 (1984) (emphasis supplied). *See also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11-12 (1988) (concession that anti-discrimination provisions of city human rights law "could be constitutionally applied at least to some" of the large clubs was fatal to club association's facial challenge).

[5] It should be noted that Dr. Griley's declaration (lodged with the Brief in Opposition) suggests that non-physicians have attempted to perform abortions on Guam. Decl. at par. 8. In one of their pleadings filed in the district court, plaintiffs also claimed that "[s]uruhanas [traditional herbalists in Chamorro culture] are widely known to perform abortions on Guam." Plaintiffs' Opposition to Defendant Ada's Motion for Partial Summary Judgment, at 28. Under the present injunction, the Guam law could not be enforced to prevent such abortions.

ticut Supreme Court's judgment and remanded for further consideration in light of its opinion. In so doing, it held that the law could be applied to abortions performed by non-physicians despite the fact that the statute broadly applied to almost all abortions and, therefore, prohibited many abortions protected under *Roe*.

The Connecticut statute at issue in *Menillo* arguably had fewer constitutional applications than the Guam law. Yet, this Court held that it should not be declared unconstitutional on its face and unenforceable in all of its possible applications. The Ninth Circuit's decision is in direct conflict with this Court's holding in *Menillo*.[6]

2. In large measure, Respondents simply ignore Petitioner's above argument and this Court's well-established precedent regarding facial challenges—addressing it only in a footnote. Br. Opp. at 9-10 n.11. They suggest that the Court's treatment of the spousal notice provision in *Casey* demonstrates that the Court broke with its long-standing precedent and established a new standard for facial challenges involving abortion statutes. According to Respondents, under the new standard, a statute may be "struck down as unconstitutional *on its face*, even though it *might* have a range of constitutional applications" if "in *a large fraction* of the cases in which [the statute] is relevant, it will operate as-a substantial obstacle to a

[6] This Court has repeatedly stated that "the normal rule [is] that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). *See, e.g., Brockett, id.* at 501-05 (state obscenity statute prohibiting both protected and unprotected speech struck down only in its invalid applications); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (holding unconstitutional state statute authorizing use of deadly force against fleeing suspects, not on its face, but insofar as it authorized use of lethal force against unarmed and nondangerous suspects); *United States v. Grace*, 461 U.S. 171, 175, 183 (1983) (accepting argument that federal statute prohibiting demonstrations on the Supreme Court grounds could not constitutionally be applied to picketing on the public sidewalks surrounding the building while rejecting contention that statute was invalid on its face).

woman's choice to undergo an abortion." *Id.* at 9-10 n.11 (emphasis in original).

Petitioner acknowledges the apparent tension between this Court's decision in *Casey* and its prior decisions regarding facial challenges in *Menillo*, *Webster* and the other cases cited in the Petition. *See* Petition at 8. However, given the *Casey* Court's heavy reliance on *stare decisis* and its failure to offer any explanation for "abandoning" these long-standing precedents, Petitioner believes that it is unlikely that the Court intended to depart from these legal principles.[7] At a minimum, if the Court does intend to abandon that legal doctrine in the context of abortion, it would seem imperative that the Court do so explicitly. Otherwise, lower courts may erroneously read *Casey* to have done away with the facial challenge rule altogether.

Moreover, assuming, *arguendo*, that Respondents accurately understand *Casey* to have established a new test for facial challenges, the possibility remains that the Guam law meets that test. For example, if the Court were to re-examine the viability concept and reject it, as the Petition requests, the Guam law could be enforced in many more instances than presently would appear

[7] In her dissent in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), Justice O'Connor stated:

> This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. [cit. omit.] Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.

Id. at 814. Justice O'Connor went on to state that although the Court has been deeply divided on other constitutional issues, "except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it." *Id.* This Court's facial challenge rule is precisely the type of "uncontroversial legal doctrine" which should be applied "evenhandedly."

possible.[8] Whether this would satisfy the "new" test for facial challenges would present a case of first impression for the Court. Thus, the Petition should also be granted so that the Court may clarify the proper standard to be applied in facial challenges of this nature.

II. THE PETITION DOES NOT SEEK TO HAVE THE COURT RENDER AN ADVISORY OPINION. NOR DOES IT SEEK TO HAVE THE COURT REDRAFT THE GUAM LAW.

Respondents claim that by suggesting that the law could be constitutionally enforced to prohibit some categories of abortion (*e.g.*, abortions for sex-selection, fetal organ transplant and those performed after viability), Petitioner is creating "hypothetical statutes [that] are [not] the law on Guam or at issue in this case." Br. Opp. at 10. Accordingly, Respondents argue that the Petition should be denied because it "is a request for an advisory opinion." *Id.* Alternatively, Respondents claim that Petitioner "is in effect requesting the Court to issue a limiting construction of the statute" and, thereby, impermissibly seeking to have the Court rewrite the Guam law. *Id.* at 15.

Respondents' arguments appear to be based upon a fundamental misunderstanding of the nature of an advisory opinion and a wholesale disregard for the different legal standards applicable to "facial" and "as-applied" challenges. Much of Respondents' apparent confusion stems from their mistaken notion that because the Guam law does not specifically "mention sex-selection, fetal tissue sales, or even viability," Br. Opp. at 10, the law does not prohibit such abortions. Nothing could be further from the truth.

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[8] Petitioner notes that Respondents make no attempt to defend the validity of viability as an appropriate constitutional benchmark for the State's authority to prohibit abortion. And for the reasons set forth in the Petition, Petitioner continues to believe that the selection of viability should not be regarded as settled law. *See* Petition at 15-18.

The Guam law prohibits all abortions not necessary to save the mother's life or to prevent grave impairment to her physical health. This broad prohibition clearly includes a prohibition on abortions performed for the above-specified reasons, as well as abortions performed by non-physicians. Thus, Petitioner is in no way "inventing" circumstances to which the law presently does not apply and seeking an advisory opinion to determine whether a future law which did prohibit such abortions could be constitutionally applied.[9] Rather, he is legitimately asking whether he may enforce the law to prohibit the performance of certain abortions which it *already* proscribes. A decision by this Court, holding that he may, certainly will affect the rights of the parties to this litigation,[10] and will be binding on them.

Respondents also claim that by asking this Court whether the Guam law is constitutional in some of its applications, Petitioner is seeking to have the Court redraft the statute or to issue a limiting construction. In suggesting circumstances under which the law may be constitutionally applied, however, Petitioner is doing no such thing. Rather, he is simply acknowledging the facial nature of this challenge—a fact that Respondents steadfastly ignore because they cannot meet their heavy burden

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[9] Respondents' basic mistake in this regard apparently causes them to rely upon such wholly inapplicable cases as *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), where the Court declined to address the constitutionality of administrative regulations that had not yet been formally adopted.

[10] Additionally, Respondents claim that "the lack of a plaintiff with a real stake in the 'controversy' deprives this Court of Article III jurisdiction." Br. Opp. at 10-11. Thus, Respondents appear to suggest that they, as plaintiffs, were not proper parties to obtain a judgment declaring this statute unconstitutional in all of its applications. As a result, they apparently concede that the relief they were granted is broader than to which they were entitled. For the same reason, Respondents' complaint that there is no "factual record" on which the Court could decide whether the applications suggested by Petitioner are constitutional (*id.* at 12-13) cannot be taken seriously.

under the facial challenge rule.[11] The above issues raised by Respondents are not applicable to facial challenges of this nature and the cases they cite are, therefore, inapposite.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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[11] Respondent's reliance upon cases addressing issues of statutory interpretation or construction, vagueness and severance is misplaced. None of those cases is relevant because Petitioner is not asking the Court to interpret an ambiguous section of Guam law or to sever unconstitutional language. Petitioner simply seeks recognition of his authority to enforce the law under those circumstances permitted by the Constitution.